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No. .....

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In The

Supreme Court of the United States

October Term, 1982

—o—

RICHARD BARTEL,

Petitioner,

vs.

JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF IOWA

—o—

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QUESTION PRESENTED FOR REVIEW

In the absence of statutory authorization for public reimbursement of attorney fees and expenses, is it a violation of due process clause of the Fourteenth Amendment for the government to impose upon the incumbent, who has the statutory obligation to defend an election contest, the obligation to finance a defense on behalf of the electorate with his own personal funds?

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CITATIONS TO OPINIONS BELOW

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of Iowa, which became a final judgment on August 13, 1982, when the Supreme Court of Iowa entered an order denying and overruling Petitioner's Application for Further Review in the case entitled *Richard Bartel v. Johnson County and the Johnson County Board of Supervisors, et al.*, No. 2-66522 (A. p. A-2).

The ruling of the District Court of the State of Iowa in and for Johnson County in the case of "Richard Bartel v. Johnson County and the Johnson County Board of Supervisors, et al." is unreported and is printed in Appendix D, *infra*, pp. A-13 to A-17. The opinion of the Iowa Court of Appeals of the State of Iowa, printed in Appendix C, *infra*, pp. A-3 to A-12 is reported in 322 N. W. 2d 901 (Iowa App. 1982). The Petitioner filed an Application for Further Review pursuant to Rule 402, Iowa Rules of Appellate Procedure on June 8, 1982. This Application was denied and overruled by the Supreme Court of Iowa on August 13, 1982 (Appendix B, p. A-2).

STATEMENT OF JURISDICTION

The opinion of the Iowa Court of Appeals of the State of Iowa was entered on May 25, 1982. A timely Application for Further Review was filed with the Supreme Court of Iowa on June 8, 1982. The Supreme Court of Iowa denied the Application for Further Review on August 13, 1982, and the judgment of the Court of Appeals became final on August 13, 1982. This Petition for Certiorari was filed within ninety (90) days of that date. The order denying Application for Further Review referred to herein is printed in Appendix B, p. A-2. This Court has jurisdiction under 28 U. S. C. 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The State statutes and Federal Constitutional provisions involved are the following, and are printed in Appendix A at page A-1, *infra*:

1. Amendment 14, Section 1 of the U. S. Constitution;
2. Chapter 50.45, 1971 Code of Iowa;
3. Chapter 57.3, 1971 Code of Iowa;
4. Chapter 62, 1971 Code of Iowa.

RAISING THE FEDERAL QUESTION

1. In petition of Equity filed in the State trial court, Petitioner, in Division II (setting forth an implied trust claim) based his claim for restitution in the WHEREFORE clause, in part, on the Fourteenth Amendment (State Appellate Appendix, p. 7).
2. In petition of Equity filed in the State trial court, Petitioner, in Division III (setting forth a "private County Attorney" claim) raised the Due Process clause and the Fourteenth Amendment, and requested restitution, in part, on the basis of the Fourteenth Amendment in the WHEREFORE clause (State Appellate Appendix, pp. 7 and 9).
3. In the Second Amendment to Petition filed in the State trial court, Petitioner, in Division II, para-

graph 22, referred to the Federal Constitutional grounds asserted in the Petition and, in Division III, paragraph 22, referred to the "Federal constitutional grounds asserted in this Division, including Due Process and Equal Protection" (State Appellate Appendix, pp. 28-29).

4. In the Appellant's brief, filed in the State appellate court, Petitioner cited the United States Constitutional Amendments, 5, 6 and 14 in the table of authorities (State Appellate Appendix, p. vi).

5. In the presentation of the appellate argument on the solitary issue of reimbursement of attorney fees and expenses, the Petitioner referred in Appellant's Brief to the federal constitutional provisions expressly enumerated in his petition (Appellant's Brief, p. 6). In Appellant's Brief (p. 16), the Petitioner cited *Wesberry v. Sanders,* 376 U. S. 1, 17, 18, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964) and on pp. 19-20, cited *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 392-93, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) and *Hall v. Cole,* 412 U. S. 1, 4-5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973). In Appellant's Brief, p. 22, the Petitioner expressly anchored his argument for recovery of attorney fees and expenses upon the United States Constitution, Amendments 6 and 14.

6. In the Application for Further Review to the Supreme Court of Iowa, Petitioner, in the Table of Authorities, cited the 6th and 14th Amendments to the U. S. Constitution (p. iii). The Petitioner raised with the Supreme Court of Iowa

the fact that the majority (of the Iowa Court of Appeals) "did not consider controlling federal and state constitutional provisions . . ." (p. 3), and expressly cited U. S. C. A., Amendment 14 and, also, an Iowa case, *Devine v. Wonderlich*, 268 N. W. 2d 620, 623 (Iowa 1978) which was based on constitutional decisions rendered by the Supreme Court of the United States (Application for Further Review, pp. 3 and 5). The Petitioner argued for adoption of this Court's reasoning in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) (p. 7), and, in support of Petitioner's contention that his defense of an election challenge protected the political franchise deemed fundamental to democratic government, the Petitioner expressly cited U. S. C. A. 6 and 14 (Application for Further Review, p. 8).

STATEMENT OF THE CASE

On November 21, 1977, the Petitioner filed an equity suit in the Johnson County District Court against Johnson County and the Johnson County Board of Supervisors seeking from the Respondents reimbursement for attorney fees and costs incurred by the Petitioner in defense of an election contest and in other derivative lawsuits. On the 19th day of February, 1981, the District Court dismissed Applicant's petition, as amended.

On March 19, 1981, the Petitioner filed an appeal to the Supreme Court of Iowa. The case was transferred

from the Supreme Court of Iowa to the Iowa Court of Appeals for disposition, and the case was submitted to the Iowa Court of Appeals on February 3, 1982. On May 25, 1982, by a 3-2 decision, the Court of Appeals affirmed the Johnson County District Court. Mr. Bartel filed an Application for Further Review with the Supreme Court of Iowa, pursuant to Rule 402, I. R. App. P. The highest appellate court denied and overruled the Application for Further Review on August 13, 1982. The Petitioner filed the instant petition seeking redress.

AUTHORITIES AND ARGUMENT

The Iowa Court of Appeals decided an important question of federal constitutional law by denying Petitioner's application for public reimbursement of attorney fees and expenses incurred in defense of a contest of election. Petitioner contends that the ruling of the Iowa Court of Appeals has serious consequences upon the political franchise:

1. Since the political process had culminated and the Petitioner's candidacy was accepted and the candidacy of others repudiated, the funds expended by the Petitioner were in defense and protection of the choice of the electorate and the expenses incurred provided the people with legal counsel and finances to secure and protect the result of the political franchise and to secure a full and fair contest of election hearing. The electorate made no contribution to the defense fund.

2. Without public reimbursement of the Incumbent's expenses and attorney fees, a contest of election challenge itself may compel any person without the financial means to defend against the challenge, to withdraw or resign. The instant case comprises the basis for a general, more ominous principle of law in regard to future elected candidates who must finance their own defense. As the Respondents argued in this case: ". . . Mr. Bartel had the option of not defending the election contest. If he had chosen this option, he may have lost his elected position as a supervisor, but he would not have been assessed damages." (Appellee's Brief in State court, p. 10).

3. That an election contest defense which protects the political franchise should, on due process grounds, provide an overriding consideration for recovery of attorney fees and expenses, and also an exception to the American rule which, in the absence of statutory authorization for attorney fees and expenses, disallows them.

The Petitioner contends the Due Process Clause guarantees recovery of attorney fees and expenses under theories of "implied trust" and "private county attorney". The Iowa Court of Appeals appeared swept up by the fact that the Petitioner, Mr. Bartel, was, in fact, the individual who was elected and that since he was the Incumbent, this distinguished him from the group who formed the basis for claims of implied trust of "private county attorney". However, under the democratic theory of government, all citizens of Johnson County owe acceptance and support to the choice of the electorate upon the culmination of the

political process. The democratic theory of government applicable in the State of Iowa and in this action creates the class of persons that the Petitioner represents, and from whom he seeks reimbursement. The people of Johnson County are the government. Once the people elect a government officer, he or she becomes the representative of all the people, and the filing of an election challenge itself does not diminish or negate the outcome of the political process. The contestant must negate the outcome of an election by establishing, in Court, the merits of his or her election challenge.

Petitioner contends that his defense of an election challenge protected the political franchise; a franchise this Court has deemed fundamental to democratic government. *Wesberry v. Sanders,* 376 U. S. 1, 17-18, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964); *Reynolds v. Sims,* 377 U. S. 533, 561-562, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506, 527 (1964). According to the reasoning and grounds contained in *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) and/or *Serrano v. Priest,* 569 P. 2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977), the Petitioner avers he is entitled to attorney fees and expenses under the theories of implied trust or "private county attorney" for the protection of a fundamental right of the electorate (U. S. C. A., Amendment 14).

The Petitioner alleges that through his efforts he created a defense fund and made expenditures to protect the political interests of a plurality of the voters of Johnson County, and the outcome of the political process, and the electorate as a class of persons, profited from the fund without having contributed to its successful creation or

maintenance, which benefited the Respondents financially. The above situation created an implied trust and the Petitioner, Richard Bartel, should receive compensation from the Respondents for the legal services and other costs the Petitioner expended on behalf of the Respondents and said compensation should be commensurate with the efforts expended in providing legal services and other costs, and commensurate with the result secured.

The Petitioner's attorneys acted in the capacity of "private county attorneys" in successfully defending the election challenge for the following reasons:

The expense of attorney fees and other defense costs brought about benefits to a broad class of citizens, and the Incumbent, by hiring attorneys to protect the decision of the ballot box, employed private attorneys who were acting *pro bono publico*. The contestant's filing of the election challenge necessitated the acquisition of legal counsel for the private enforcement of the election decision, and under the adversary procedure established by Chapter 62, The Code, the selection of counsel and the burden of defense, fell upon the Incumbent. In the election contest referred to above, the issue presented had great societal importance and the democratic principles embraced by the Federal Constitution served to vindicate the employment of legal counsel so that the election contest challenge could not improperly or illegally thwart the decision of the electorate. The number of people standing to benefit from the Incumbent's defense of the contest challenge were not only the plurality of the voters who elected the Petitioner, but also those who feel bound to uphold the results of the democratic process. The contest litigation resulted in a

vindication of a societally important public policy and the necessary costs of securing an election contest defense, and the result obtained, transcended the individual incumbent's pecuniary interest to the extent requiring subsidization by the Respondents.

In the instant case, the Petitioner, the prevailing party in the election contest, is not seeking reimbursement from the losing party, the contestant, but rather, the Petitioner is seeking reimbursement from the people of Johnson County who elected him to office and who benefited by Petitioner's financing of the defense to the election challenge. The expenditure of funds by the Petitioner, in defending the decision of the electorate, created a trust relationship between the Petitioner and the people of Johnson County (*Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U. S. at 257).

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CONCLUSION

For the reasons set forth above, the Court should issue a writ of certiorari to the Iowa Court of Appeals of the State of Iowa to correct a manifest error in its ruling on the question presented.

Respectfully submitted,

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